Re Siow Ah Moi @ Seow Yin Fong; ex p United Orient Leasing Co Bhd

HIGH COURT (KUCHING) — BANKRUPTCY PROCEEDINGS NO 370 OF 1986–II
HAMID SULTAN JC
28 MARCH 2007

Bankruptcy — Discharge — Application — Debtor executed guarantee with her husband for business facilities which she had no benefit of — Official assignee's report very favourable to debtor — Non-compliance of r 194 Bankruptcy Rules 1969 by the registrar — Whether application for discharge should be allowed

The appellant (housewife) now aged 71 years was made a bankrupt by United Orient Leasing Co Berhad, Kuching for failure to honour her obligations under a guarantee which she executed with her husband for business facilities which she had no benefit of. There were 17 creditors who filed the proof of debt the total sum of the same amounting to more than RM9m. The appellant had filed her statement of affairs on 5 October 1987. Public examination was conducted on 19 December 1992 and the court had directed the appellant to pay monthly instalment of RM20 commencing from 1 January 1993. She had been paying the instalment without default. On 9 June 2005 the appellant made an application (encl 97) for discharge as a bankrupt. The official assignee's report was very favourable to the appellant. The respondent/creditor objected on the following grounds: (i) there was non compliance of r 194 of Bankruptcy Rules 1969 ('Rules') by the registrar in that the registrar must have forthwith sent a copy of the application for discharge for insertion in the gazette; and (ii) the Director-General of Insolvency ('DGI') must have sent a copy of such notice to each creditor who had proved not less than 14 days the day so appointed. Both of these provisions have not been complied with by the registrar. The learned registrar refused to allow the appellant's application for discharge as a bankrupt made pursuant to s 33 of the Bankruptcy Act 1967 ('Act') and r 194 of Bankruptcy Rules 1969 ('Rules'). The appellant appealed. The appeal was opposed by one creditor.

Held, allowing the appeal with no order as to costs:

(1) The court does not think that the application for discharge can purely be defeated by the fact of non-compliance of r 194 of the Rules without the respondent showing in what manner the respondent had been prejudiced (r 274 of the Rules) (see para 14).

(2) Further, the complaint by the respondent was not against the appellant but the registrar and DIG. The registrar and DIG were obliged to comply with their obligations stated in r 194 of the Rules and there is no evidence adduced by

the respondent to show that it was not done. Even if there was such non-compliance, bearing in mind it was purely an administrative act, the respondent can in the circumstances of the case, take the necessary application to direct the registrar or DIG to comply with the provisions of r 194 of the Rules. In this case, it was not done. By analogy, support for the proposition that the registrar and DIG are obliged to act as stated in r 194 of the Rules was found in the case of *Re Pat A Beins* [1937] MLJ 193 (see para 15).

(3) The court is vested with the jurisdiction to discharge the bankrupt. In ordinary circumstances the court will make a person bankrupt if the conditions stated in s 5 of the Act is satisfied. It must be asserted that for all general principles and rules there are always exceptions. It may be recognised exceptions pursuant to case laws or possible exceptions to be confirmed by case laws. Because the court has a discretion the court may refuse to make a person a bankrupt, in case where a person is spending his last days in death bed or such similar situations or for other good reasons which may include practical and feasible considerations which will benefit all parties (see para 22).

Obiter:

It was wrong for creditors to think that they had a substantive right given by law to make a person bankrupt or continue to keep them bankrupt until their natural death. It had never been the intention of Parliament to give absolute right to creditors to make a person a bankrupt. The discretion to make a person bankrupt is entrusted to the courts and the courts can exercise the discretion not to make a person bankrupt according to the justice of the case (see s 4 of the Act).

[Bahasa Malaysia summary

Perayu (seorang suri rumah) kini berumur 71 tahun dijadikan seorang bankrap oleh United Orient Leasing Co Bhd, Kuching yang disebabkan oleh kegagalannya membayar balik di bawah satu jaminan yang ditandatanganinya bersama suaminya untuk satu kemudahan perniagaan di mana beliau tidak mendapat sebarang manfaat. Terdapat 17 pemiutang-pemiutang yang telah memfailkan bukti hutang kesemuanya untuk jumlah sebanyak lebih daripada RM9j. Perayu telah memfailkan penyata urusannya pada 5 Oktober 1987. Pemeriksaan awam telah dijalankan pada 19 Disember 1992 dan mahkamah telah memerintahkan perayu untuk membayar ansuran sebanyak RM20 sebulan bermula dari 1 Januari 1993. Beliau telah membayar ansuran tersebut tanpa keingkaran. Pada 9 Jun 2005 perayu telah memohon (kandungan 97) untuk pelepasan kebankrapan. Laporan pegawai penerima harta adalah memihak kepada perayu. Responden/pemiutang membantah atas alasan-alasan berikut: (i) tidak mematuhi k 194 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah') oleh pendaftar dan bahawa pendaftar seharusnya dengan segera menghantar sesalinan permohonan untuk pelepasan untuk diwartakan; dan (ii) Ketua Pengarah Insolvensi ('KPI') seharusnya menghantar sesalinan notis tersebut kepada setiap pemiutang yang telah membuktikan tidak kurang daripada 14 hari sebelum tarikh yang ditetapkan. Kedua-dua peruntukan ini tidak dipatuhi oleh pendaftar. Pendaftar yang bijaksana enggan membenarkan permohonan perayu untuk dilepaskan daripada kebankrapan yang dibuat mengikut s 33 Akta

Kebankrapan 1967 ('Akta') dan k 194 Kaedah-kaedah Kebankrapan 1969 ('Kaedah'). Perayu merayu. Rayuan ini hanya dibantah oleh seorang pemiutang.

Diputuskan, membenarkan rayuan tanpa perintah terhadap kos:

(1) Mahkamah tidak berpendapat bahawa permohonan untuk dilepaskan dapat ditewaskan hanya semata-mata tiada kepatuhan akan k 194 Kaedah tersebut tanpa responden menunjukkan dalam keadaan apa responden telah diprejudiskan (k 274 Kaedah tersebut) (lihat perenggan 14).

(2) Seterusnya, aduan oleh responden bukannya terhadap perayu tetapi pendaftar dan KPI. Pendaftar dan KPI wajib mematuhi obligasi-obligasi mereka seperti yang dinyatakan di k 194 Kaedah tersebut dan tiada bukti yang dikemukakan oleh responden bahawa ia tidak dilakukan. Walaupun jika terdapat ketidakpatuhan, ia patut diingati bahawa ia adalah tindakan pentadbiran semata-mata, responden boleh dalam keadaan kes ini, memohon terus kepada pendaftar atau KPI untuk mematuhi peruntukan-peruntukan k 194 Kaedah tersebut. Dalam kes ini, ia tidak dilakukan. Secara analogi, sokongan untuk kenyataan bahawa pendaftar dan KPI adalah bertanggungan untuk mengambil tindakan seperti yang dinyatakan di k 194 Kaedah tersebut dapat ditemui di dalam kes *Re Pat A Beins* [1937] MLJ 193 (lihat perenggan 15).

(3) Mahkamah dikurniakan dengan bidang kuasa untuk melepaskan si bankrap. Dalam keadaan biasa, mahkamah ini akan membuat seorang bankrap jika syarat-syarat yang dinyatakan di s 5 Akta tersebut dipenuhi. Ia mesti dinyatakan dalam kesemua prinsip-prinsip dan kaedah-kaedah am selalunya terdapat pengecualian. Ia berkemungkinan pengecualian yang dikenal pasti melalui undang-undang kes ataupun kemungkinan pengecualian yang akan disahkan oleh undang-undang kes. Oleh kerana mahkamah mempunyai budi bicara untuk enggan menjadikan seseorang bankrap, dalam kes di mana seseorang menghabiskan hari-hari terakhirnya di katil kematian ataupun dalam situasi yang serupa atau atas alasan baik yang lain yang mana mungkin termasuk pertimbangan yang berkesan dan praktikal yang dapat membawa manfaat kepada semua pihak (lihat perenggan 22).

Obiter:

Adalah salah bagi pemiutang-pemiutang memikirkan bahawa mereka mempunyai hak substantif yang diberikan oleh undang-undang untuk menjadikan seseorang bankrap atau terus menjadikan mereka seorang bankrap sehingga berakhir hayat mereka. Ia tidak pernah menjadi niat parlimen untuk memberikan hak mutlak kepada pemiutang-pemiutang untuk menjadikan seseorang bankrap. Budi bicara untuk menjadikan seseorang bankrap adalah diamanahkan kepada mahkamah-mahkamah dan mahkamah-mahkamah dapat menggunakan budi bicaranya untuk tidak menjadikan seseorang bankrap mengikut keadilan kes (lihat s 4 Akta tersebut).]

Notes

For cases on application for discharge, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2404–2416.

Cases referred to

Ang Ah Kang, Re [1994] 2 CLJ 738 (refd)
Mohana Sundari d/o M Subramaniam, Re, ex p United Prime Corp. Bhd [2004] 5 MLJ 227 (refd)
Ng Kok Wah v UMW Industries [1995] 2 CLJ 284 (refd)
Pat A Beins, Re [1937] MLJ 193 (folld)
Public Bank Berhad v Kok Lee Wah [2004] 4 MLJ 433 (refd)
Public Bank Bhd v Kok Kee Wah [2004] 4 MLJ 433 (refd)
Siah Ooi Choe, Re; ex p Hongkong and Shanghai Banking Corporation [1998] SLR 903 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 4, 5, 33, 33B(3), Form 48, Form 49, Form 50, Form 51, Form 135(8)
Bankruptcy Rules 1969 rr 194, 274
Penal Code ss 421–424

Fabian Sigar (John Shek, Sigar, Wei Yee & Co) for the appellant (applicant/debtor).
Lau Mei Ling (Sim & Yee Advocates) for the respondent (petitioning creditor).

Hamid Sultan JC:

[1] This is my judgment in respect of the appellant's appeal against the decision of the learned registrar's refusal to allow the appellant's application for discharge as a bankrupt made pursuant to s 33 of the Bankruptcy Act 1967 (BA 1967) and r 194 of Bankruptcy Rules 1969 (BR 1969). The appeal is only opposed by one creditor.

[2] The appellant (housewife) now aged 71 years was made a bankrupt by United Orient Leasing Co Berhad, Kuching for failure to honour her obligations under a guarantee which she executed with her husband for business facilities which she had no benefit of. There were 17 creditors who filed the proof of debt the total sum of the same amounting to more than RM9m. The appellant had filed her statement of affairs on 5 October 1987. Public Examination was conducted on 19 December 1992 and the court had directed the appellant to pay monthly instalment of RM20 commencing from 1 January 1993. She has been paying the instalment without default. On 9 June 2005 the appellant made an application (encl 97) for discharge as a bankrupt. The Official Assignee's report is very favourable to the appellant. The report shows that: (i) the bankrupt is 69 years old with four children between 39–43 years old; (ii) the bankrupt is only a housewife and did not have any other assets; (iii) the bankrupt has not committed any offence under the Act in particular ss 421 to 424 of the Penal Code. The relevant part of the report is reproduced below:

> 3. Mesyuarat pertama pemiutang-pemiutang telah diadakan pada 21 Julai 1988 dan tiada apa-apa resolusi yang telah diluluskan.
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> 4. Pemeriksaan Awam telah ditetapkan pada 20 Mei 1988 tetapi telah ditangguhkan kepada 25 Ogos 1988 dan tiada apa-apa resolusi yang telah diluluskan.

5. Pada Pemeriksaan Awam yang diadakan pada 19 Disember 1992, mahkamah telah mengarahkan agar sibankrap membayar ansuran bulanan sebanyak RM20 sebulan mulai 01 Januari 1993. Bayaran ansuran sibankrap adalah kemaskini.

6. Setakat ini, 17 bukti hutang telah difailkan terhadap estet si bankrap dan butirannya adalah seperti dalam lampiran 'A' yang dikembarkan. Jumlah bukti hutang tersebut adalah sebanyak RM9,032,324.39.

7. Dengan baki kredit dalam estet sibankrap sebanyak RM20,676.10 hanya mencukupi untuk mengistiharkan dividen lebih kurang 0.185% kepada semua pemiutang. Sesalinan 'sekim Pembayaran Dividen' berkaitan dengan pengiraan di atas disertakan dan ditandakan sebagai lampiran 'B'.

8. Sibankrap sekarang berusia 69 tahun [lahir pada 19 April 1936] telah berkahwin dengan En Wong Ming Tah, tidak bekerja dan mereka mempunyai empat orang anak yang berumur antara 39 hingga 43 tahun. Beliau hanyalah seorang suri rumah. Kesemua anak beliau telah pun berkeluarga. Beliau sekarang tidak mempunyai apa-apa harta untuk dihasilkan.

9. Kebankrapan beliau adalah disebabkan menjadi penjamin bagi pinjaman perniagaan syarikat suami beliau, En Wong Ming Tah.

10. Sepanjang pengetahuan Ketua Pengarah Insolvensi, sibankrap tidak melakukan kesalahan di bawah Akta Kebankrapan 1967 atau di bawah ss 421, 422, 423 dan 424 kanan Keseksaan dan tiada bukti dikemukakan tentang fakta-fakta yang dinyatakan di dalam ss 38 dan 109 Akta Kebankrapan 1967. Kelakuan beliau sepanjang kebankrapan adalah memuaskan.

11. Notis permohonan sibankrap untuk pelepasan di bawah s 33 telah diterima oleh Ketua Pengarah Insolvensi pada 01 Ogos 2005.

[3] The respondent/creditor objects on the following grounds:

(i) there is non compliance of r 194 of BR 1969 by the registrar in that (i) the registrar must have forthwith sent a copy of the application for discharge for insertion in the gazette and (ii) the Director-General of Insolvency (DGI) must have sent a copy of such notice to each creditor who has proved not less than 14 days the day so appointed. Both of these provisions have not been complied with by the registrar.

(ii) there are no grounds given by the bankrupt to justify a discharge under s 33 of BA 1967 when:

(a) 16 creditors have filed their proof of debt inclusive of the respondent whose claim was for the sum of RM171,872.64 on 24 August 1987;

(b) at the public examination, the appellant affirmed that she has liabilities owing of which her unsecured liabilities amounted to RM1,018,496.11 whilst her secured liabilities amounted to RM5,976,563.64. The creditors have not been given any information as to how much of these liabilities have been paid or reduced;

(c) the respondent has not been advised as to how much dividends will be declared and paid to the respondent in the event of such an application;

(d) the respondents has not been advised as to the reason why the appellant is applying for a discharge;

(e) the respondents has not intimated whether the appellant has been making contribution to the office of DGI since the public examination in 1991; and

(f) the respondent has made objection under Form 51C to the DGI and appellant's advocates.

[4] The appellant's counsel in his submission in support of the appeal, inter alia, says as follows:

(a) the appellant, aged 71 years old this year. She has been adjudged a bankrupt since 11 May 1987, almost 20 years ago. Before being adjudged a bankrupt, the appellant was a housewife and had never been employed. The appellant as well as her husband had become dependents of their two sons living abroad. One son is working as a pastor and the other is working as an expatriate, civil engineer. The appellant was made a bankrupt due to her role as a guarantor in assisting her husband in all his business dealings. The appellant due to her hardship had undergone tremendous mental torture as well as a major surgery to remove her colon cancer. From the report lodged by the Official Assignee's Office, as of date there are 17 creditors who have lodged their proof of debts. Based on the Official Assignee's report, all the appellant's husband's charged properties have been successfully sold off and utilised to pay off the creditors by the Official Assignee, leaving the sum of RM9,032,324.39 remaining unpaid in her estate. Then the remaining balance of RM20,676.1 was given to the Official Assignee which would be sufficient to declare a dividend of about 0.185% to all the creditors;

(b) the appellant became bankrupt through no fault of her own but merely whilst acting as a guarantor to her husband's businesses which collapsed thus causing her to be part of the misfortune. Due to the business difficulties faced by her husband, the appellant was neither able to obtain credit facilities nor to open her own accounts either from the banks or the private sectors. The appellant has no dealings at all in the companies that her husband was involved. Her conduct in the business was merely acting as a guarantor to the facilities. As a matter of fact, she has no first hand knowledge of the businesses and was not involved in the running of the companies. Thus, her status of bankruptcy was not through her own dishonest dealing or rash and extravagant conduct in business affairs, which in reality caused the detriment of all the creditors. There were none of such features in the present application. The Official Assignee's report can confirm such facts. On this point the appellant will rely on the case of *Re Mohana Sundari d/o M Subramaniam ex p United Prime Corp Bhd* [2004] 5 MLJ 227 where Zulkifli J (as he then was) opined:

> Some guidance can be found in the principles to be applied in considering the application for an order of discharge in the Bankruptcy Act 1967, ss 33(3) and (4) read together with subs (6). The fact that there is a provision in the Act which allows a discharge from bankruptcy itself shows it is intended that a bankrupt have some form of relief. Further, the provision of the new ss 33A of the Act allows a bankrupt to apply to the Official Assignee directly to obtain his discharge after only five years

of being a bankrupt. It would appear that if a bankrupt is not guilty or in breach of any of the matters mentioned in the subsections, then the court is empowered to discharge the bankrupt unconditionally taking into account the facts and circumstances of the case.

(c) the report of the Official Assignee is clear proof of the conduct of the appellant. Based on this report the appellant had never committed any offence under ss 421 to 424 of the Penal Code. On this point, the appellant will rely on the above case where the court took the view:

> As to the principles to be applied in considering the application for an order of discharge, quite apart from case law which will be dealt with later in this judgment, the Act does provide some guidance and this is reflected in the provisions of ss 33(3) and (4) read together with subs (6) of the same section of the Act. These provisions of the Act provide amongst others a basis under which an order of discharge is to be considered as follows:
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> (i) Whether the bankrupt has committed an offence under the Act and under ss 421, 422, 423 or 424 of the Penal Code? and
>
> (ii) Whether the bankrupt's conduct fit into any of the categories of conduct as listed out in ss 33(6) of the Act?

(d) the appellant had fully satisfied both conditions as stated in the said case. The report of the Official Assignee plays a very important part in the application under s 33 (3) of the Act. In accordance with the Official Assignee's report, at the time when the appellant was made a bankrupt, the debt incurred by the appellant through her role as a guarantor was RM9,032,324.39. Whereas, for the sum of RM3,897,493.50 the said debt had been written off by the creditor. At the time of application, all the creditors had been served with notices by the Official Assignee. At the date of hearing of this application, only five creditors opposed by way of giving notice of objection. However, the rest did not file any notice of objection as provided for under the Bankruptcy Rules 1967. As for the creditors who have raised objections, the sums incurred a total sum of RM1,686,861.10. The accrued total of those creditors who raised no objection amounts to RM7,345,462.80; by taking into account the sum of RM9,032,324.39 the total outstanding amount is reduced from RM9,032,324.39 to RM1,686,861.10. As such, in accordance with ss 33B (3), they are deemed to have no objection to the application of discharge of the bankrupt. Thus, the appellant is still owing the sum of RM1,686,861.10 at the time of hearing. On this point the appellant's counsel relies on the above case and refers to the court's view as follows:

> I am also of the view that the amount of the debt still owing to the creditor is not a factor which the court should place too much reliance on when considering an application to be discharges from bankruptcy. In the case of *Re Siah Ooi Choe; ex p Hong Kong Shanghai Banking Corporation*, the Court held on this point, inter alia, as follows:
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> > …with reference to the size of the debt, the court agreed that it was a very big one, but there was no upper limit set out by the Act beyond which discharge was barred. The huge amount of debt here merely reflected that fact that a big business

when it failed, tended to fail in a big way and it was in recognition of this fact that no maximum amount was stipulated in the Act… A

The judgment debtor has been a bankrupt for almost 14 years and that 14 years is a long period of penance by any measure. The judgment debtor is now currently 45 years of age and humbly desires to spend the remainder of her mortal life free from the shackles and stigma of bankruptcy that has plagued her for so many years. It is my finding that the SAR in pronouncing the said order for conditional discharge has: B

(a) misdirected herself in law when she allowed the application to discharge from bankruptcy subject to more onerous conditions;

(b) taken into account and given too much weight to irrelevant factors such as the size of the debt still owing to the creditors and the judgment debtor's ability or inability to continue paying; C

(c) the monthly instalments;

(d) misdirected herself in law when she increased the monthly instalments summarily without first conducting an investigation into the judgment debtor's ability to pay the same; and D

(e) failed to take into account and/or given sufficient weight to pertinent factors such as the cause of the judgment debtor's bankruptcy, the exemplary conduct of the judgment debtor during the bankruptcy, commercial morality and interests of the pubic at large. E

[5] Further the appellant's counsel relies on the case *Re Ang Ah Kang* [1994] 2 CLJ 738 where Abdul Aziz Mohamad J (as he then was) ruled that:

Since the bankrupt had been faithfully paying RM60 monthly to the Official Assignee and in view of the fact that the bankrupt was already 60 years of age, the court accepted that the bankrupt was not likely to be gainfully employed and holding that it was against public policy to chain a person to bankruptcy when it did not serve anyone any good, the court allowed the application. F

Another factor which is altogether not to be taken into account is the fact of whether or not the bankrupt is in a position to afford and continue paying the monthly instalments. Nowhere is it stated in the provisions of the Act or in the case law analysis cited hereinabove that such factor is to be taken into account and the court should be slow in accepting such argument. G

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[6] Finally, the appellant relies on the case of *Public Bank Berhad v Kok Lee Wah* [2004] 4 MLJ 433 where Suriyadi J (as he then was) opined that (at p 439):

Even if I were to accept the appellant's assertion that a substantial sum still remained unpaid, I ask myself whether the predicament of having been under a cloud of bankruptcy for such a long period, which had deprived her of business opportunities, borrowing money from any financial institution, and in the meanwhile constantly embarrassed by the stigma could justify the discharge of the balance. In other words, the sufferings under the bankruptcy order could be equated with the balance of debt (or read from another angle, the unpaid debt had been sufficiently repaid by the long sufferings under that cloud of bankruptcy). I

[7] The appellant refers to r 194 of the BR 1969 which reads as follows:

> A bankrupt intending to apply for his discharge under s 33 shall produce to the Registrar a certificate from the Official Assignee specifying the number of his creditors of whom he has notice whether they have proved or not and the Registrar shall not less than twenty-eight days before the day appointed for hearing the application give notice of the time and place of the hearing of the application to the Official Assignee. The Registrar shall forthwith send a copy of such notice for insertion in the gazette and the Official Assignee shall send a copy of such notice to each creditor who has proved not less than fourteen days the day so appointed.

and says as follows:

(a) the appellant has complied with the rule when she filed the same to court on the 8 July 2005. Having done that (through the interpretation and plain reading of r 194), it is the duty of the registrar to fix a hearing date, time and place of the application. On 10 August 2005, the appellant received a notice of hearing from the court stating that the hearing of the application has been fixed on 6 September 2005;

(b) as for the gazette, the appellant herein has no knowledge whether such notice has been gazetted. Whether the appellant's application ought to be penalised for the fact that the notice was not gazetted by the registrar should not be the case, since the appellant has complied with the requirement as stated under r 194 of the BR 1969.

[8] I must say here that most of the statements and evidences tendered by the appellant were not by way of affidavit. Since there was no objection from the respondent and facts of the case compel me to act, I have disregarded the procedural flaws. In my view, if parties to the litigation process have not complied with procedural rules they must be asked to regularise the proceedings and if they still fail to do so, then the learned deputy registrar should dismiss the application. Further, if the parties to the proceedings blatantly fail to comply with the procedural rules, costs must not be allowed if they succeed in their application unless the justice of the case so requires. Such step is essential and necessary to ensure that matters are heard in an orderly manner as per the rules of court.

[9] The respondent in reply to the submission says as follows:

(a) the case of *Public Bank Bhd v Kok Kee Wah* [2004] 4 MLJ 433, rendered by the appellant's counsel states very clearly that:

> The question of whether the predicament of having been a bankrupt for such a long time, which had deprived the respondent of business opportunities as well as financial facilities and also the stigma attached to it could on balance justify the discharge order, was not the sole question for consideration. It was merely one of the many complex considerations to be looked into by the court;

(b) The fact that the bankrupt would be discharged today will add nothing to her economically. She is not deprived of any business or financial opportunities, or the stigma attached to her. It is not going to be any different to her and allowing her to be discharged will not in any way enhance her economically or

financially. In respect to her colon cancer, the medical reports are dated 1994 and 1995. With respect, she was doing fine and well during her appearances in court last year;

(c) the appellant has not provided a shred of evidence as to the appellant's reason for discharge, or that he is in no position to make any further payment;

(d) part from the above, the size of the debt still owing to the respondent here and the other creditors is a factor which the court has to take into account as well and will rely on the case of *Ng Kok Wah v UMW Industries* [1995] 2 CLJ 284;

(e) the appellant at a creditors' meeting confirmed her outstanding liabilities to both secured and unsecured creditors to the tune of nearly 8 million in 1991. Notwithstanding the same, the respondent's proof of debt filed in 1986 was for a sum of RM171,872.02. How much is the appellant going to pay to justify a release under s 33?;

(f) at the hearing of the application, the court must take into account a report of the DGI as to the appellant's conduct and affairs, including a report as to the applicant/debtor's conduct during the proceedings under her bankruptcy, and may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time, or grant an order for discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the appellant. No such reports have been rendered to the respondent. The respondent does not know if such reports have been made available to the court. While coming to a decision as to the appellant's application the court must take into account public interest, commercial morality and conduct of the appellant;

(g) Section 33(3) of the BA 1967 gives the court a general discretion whether to grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to certain conditions. However, s 33(4) limits the type of orders that the court can make in certain circumstances. Section 33 (4) is divided into two limbs, ie:

(i) where the bankrupt has committed any offence under the Act or under any written law repealed by this act or under ss 421, 422, 423 or 424 of the Penal Code, then there are two types of order that the court can make, ie either:

(ii) refuse the discharge; or

(iii) suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors.

(h) Where on proof of any of the facts mentioned in subsection (6), then there are four types of order that the court can make, ie either:

(a) refuse the order; or

(b) suspend the operation of the order for a specified time; or suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors; or

(c) grant an order of discharge subject to conditions.

(i) Further, s 33(4) further provides that the powers of suspending or attaching conditions to a bankrupt's discharge may be exercised concurrently and s 33(10) provides that the court may, as one of the conditions referred to in the section, require the bankrupt to consent to judgment being entered against him by the official assignee for any balance or part of the balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge. One of the facts stated in s 33(6) which is relevant to the present case is s 33(b)(m) which states:

> That the bankrupt's assets are not of a value equal to fifty ringgit per centum of the amount of his unsecured liabilities …;

(j) in the present case, the total liabilities of the appellant is RM9,032,324.39. The appellant has no assets as disclosed in the Director-General of Insolvency report dated 14 November 2005. Therefore, it is a fact that the appellant's assets are not of a value equal to 50% of the amount of her liabilities and in consequence s 33(6)(m) is satisfied. Hence, by virtue of the second limb of s 33(4), the court can only make the four types of orders referred earlier and there is no discretion for the court to grant an absolute order of discharge; and

(k) the court must consider that neither the respondent, nor the court is given sufficient proper and valid reasons as to the conduct of the appellant during the administration of her affairs in bankruptcy. Grave injustice will be caused to the respondent and the other creditors who will stand to forgo millions. There are no reasons that can justify a discharge of the appellant today.

[10] I find that the respondent's submission has failed to take into consideration that the legislature in enacting the Bankruptcy Act and Rules have clearly the intention to give the entire discretion to the court to order an absolute or conditional discharge, taking into consideration the justice of the case, and provided that the bankrupt has satisfied to his or her best of his ability all the statutory and/or procedural requirement relating to the discharge.

[11] To decide the appeal, I need to be first be satisfied whether all procedural requirements for the application have been complied with taking into considerations the procedural objections taken by the respondent on the basis that there was a failure to comply with r 194 of BR 1969.The procedural requirements are as follows:

(a) In applying for her discharge, the bankrupt must first produce a certificate from the Official Assignee, specifying the number of her creditors. The registrar must give notice of the same to the Official Assignee at least twenty-eight days before the hearing; and enter a notice of it in the gazette. Meanwhile the Official Assignee must forward a copy of the notice of the application to discharge to each creditor who has proved, at least fourteen days before the day of the hearing;

(b) The application must be in Form 48. The certificate of the Official Assignee must be in Form 49; and the registrar's notice to the Official Assignee must be in Form 50. The notice to the creditors informing of the application of discharge must be in Form 51; and

(c) A notice in the gazette, in Form 135(8), of the application for a discharge, must be filed by the Official Assignee.

[12] The detailed exposition of the law practice and procedure is more eloquently set out by the learned author GK Ganesan in his book *Bankruptcy Law in Malaysia and Singapore - A Sourcebook of Principles, Practice, Procedure, Cases & Materials*, which in my view stands as a sufficient authoritative work in relation to Bankruptcy Law in Malaysia and there are also many more books in vogue in this field of practice. Practitioners must make an attempt to read the standard text before making an application or objecting to an application to ensure that there is a basis to make the application or objections. Pure reliance on the Act, Rules and case laws may not be sufficient to understand the legal jurisprudence and in consequence much of the courts time will be wasted as in this case, for this matter ought to have been disposed of by consent at the deputy registrar's stage.

[13] After having perused the documents filed in this proceedings, I am satisfied that there is material compliance of rules of procedure except for the complaint of the respondent of the registrar's failure to give the relevant notice and the issue that it was not gazetted which was stated earlier. This point has been adequately covered by case laws and standard text.

[14] I do not think that the application for discharge can purely be defeated by the fact of non-compliance of r 194 of BR 1969 without the respondent showing in what manner the respondent has been prejudiced for r 274 of the BR 1969 is a saving provision which states that:

> Non-compliance with any of these rules or with any rule of practice for the time being in force shall not render any proceeding void unless the court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the court may think fit.

[15] Further, the complaint by the respondent is not against the appellant but the registrar and DIG. The registrar and DIG are obliged to comply with their obligations stated in r 194 of BR 1969 and there is no evidence adduced by the respondent to show that it was not done. Even if there was such non-compliance, bearing in mind it is purely an administrative act, the respondent can in the circumstance of the case, take the necessary application to direct the registrar or DIG to comply with the provisions of r 194 of BR 1969. In this case, it was not done. By analogy, support for my proposition that the registrar and DIG are obliged to act as stated in rule 194 of BR 1969 is found in the case of *Re Pat A Beins* [1937] MLJ 193 where the court opined (at p 193):

> When a bankrupt, desirous of applying to the court for his discharge, applies for a certificate as to the number of his creditors under r 194 of the Bankruptcy Rules, to the Official Assignee, the latter cannot withhold or delay its issue. Nor can the Official Assignee delay filing the report on the bankrupt's conduct and affairs prescribed by s 33(3), Bankruptcy Ordinance (Cap 45), beyond the time prescribed by r 196(2), without applying for and obtaining, under r 288, an extension of time for doing so. Nor, finally, can the Official Assignee file, of his own initiative, further or 'supplementary' reports without similarly

obtaining the leave of the court. The Official Assignee is not a judicial, but an executive, officer. He cannot administer oaths except for taking affidavits in verification of certain documents specified in s 69(2) of the Ordinance, and he cannot, like a court, take the evidence of the bankrupt or cross-examine him within the precincts of the Bankruptcy Office, for the purpose of subsequently incorporating his answers in the report to the court required by s 33 (3) of the Ordinance. The Officical Assignee may indeed question the bankrupt, without administering an oath, and the information so obtained or answers thus given, when read over, interpreted to and signed by, the bankrupt, may be used as a basis for his Public Examination in court under the supervision of the Judge, under s 17 of the Ordinance. Such Public Examination (if already closed when the new material comes to light which is sought to be availed of at the hearing of the application for discharge) must be formally re-opened for the purpose, under s 17(9) of the Ordinance.

Thus, I am compelled to dismiss the procedural objections, raised by the respondent.

[16] Having dismissed the procedural objections, the only next thing to do in order to decide the fate of the appeal, is whether on the facts of the case I should exercise my discretion to make an order for discharge or condition for discharge or dismiss the appellant's appeal.

[17] I have considered the submission of the appellant and the respondent in detail and taken into consideration the authorities they have cited. I find it difficult to accept the resistance of the respondent and the manner it has been put in the submission taking cognizance of the fact that:

(a) the appellant is about 71 years, now;

(b) she was a guarantor who had never benefited from the transaction;

(c) she has been carrying the stigma of a bankrupt for more than 20 years;

(d) she is also a cancer patient;

(e) she has been paying the sum of RM20 to DIG as per the order of the court and the creditors will never be able to collect their dues from her during her life time; and

(f) she has not committed any offence in the Penal Code as set out in BR 1969.

(g) only one creditor is opposing.

[18] The submission of the respondent appears to be grounded on the basis that the creditor can at all times keep the bankrupt as a bankrupt until the bankrupt settles all of the obligation pursuant to law. I think that is not the purpose of the BA 1967. The object of the Act which I think is a social legislation to protect the bankrupt can be summarised as follows:

(a) to secure fair and equal distribution of available property among the creditors;

(b) to free the debtor from his debts so that he can make a fresh start as soon as he is discharged by the court;

(c) to deter people from rashly incurring debts they cannot pay; A

(d) to vest the debtor's assets in the Director General of Insolvency for equal distribution to creditors; and

(e) finally to discharge the debtor from bankruptcy and restore his civil status.

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[19] Support for my proposition is very well articulated in the case of *Re Siah Ooi Choe, ex p Hongkong and Shanghai Banking Corporation* [1998] SLR 903 where the court opined that:

> A proper approach to an application to discharge from bankruptcy involves a consideration of the object and purpose of these new provisions of the Bankruptcy Act (Cap 20, 1996 Ed) (the Act). The Act was designed to meet two major conflicting concerns. One stemmed from the recognition that many an individual businessman becomes insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle. It would be in the interest of society that people who had become bankrupt in such circumstances, and generally, should be given a second chance in life, so that the social cost of waste of entrepreneurial resources could be reduced. The other concern was that, without proper safeguards, people who had used dishonest or fraudulent methods in conducting their business affairs to the detriment of their creditors might get an undeserved advantage from their own wrongdoings. The fear of people taking advantage of their own frauds is probably as old as the institution of bankruptcy itself, and it was natural that such fears were highlighted when an easier regime for discharge from bankruptcy was being proposed. The new legislation sought to strike a balance between these two major concerns. The bill was introduced in Parliament in August 1994. It was referred to a select committee. Representations from individuals and from the financial community were heard. It was then enacted, with some amendments.

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[20] The court considering similar provisions for discharge as in our BA 1967 stated as follows: F

> The relevant provisions, I have already referred to the provisions enabling bankrupts to be discharged by the Official Assignee where the total proved debt does not exceed a prescribed amount. I want now to refer in greater detail to the provisions regulating discharges by the court. The relevant provisions are contained in s 124. Subsection (1) of that section provides that the Official Assignee, the bankrupt or any person having an interest in the matter may at any time after the making of a bankruptcy order apply to the court for a discharge. Subsection (3) provides that, subject to sub-s (4), the court may: (a) refuse the application; or (b) order an absolute discharge; or (c) make an order of discharge subject to such conditions as it thinks fit to impose, including conditions with respect to: (i) any income which may be subsequently due to the applicant; or (ii) any property devolving upon him, or acquired by him, after his discharge. Subsection (4) provides that where the bankrupt has committed an offence under the Act or under ss 421, 422, 423 or 424 of the Penal Code or upon proof of any of the facts mentioned in sub-s (5), the court shall: (a) refuse to discharge the bankrupt from bankruptcy; (b) make an order discharging him subject to his paying a dividend to his creditors of not less than 25% or to the payment of any income which may be subsequently due to him or with respect to property devolving upon him, or acquired by him, after his discharge, as may be specified in the order and to such other conditions as the court may think fit to impose; or (c) if it is satisfied that the bankrupt is

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unable to fulfil any condition specified in paragraph (b) and if it thinks fit, make an order discharging the bankrupt subject to such conditions as the court may think fit to impose. The sub-s (5) facts referred to in sub-s (4) are many and varied, but I think it would be useful to set them out. They are as follows: (a) that the bankrupt has omitted to keep such books of accounts as would sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy, or within such shorter period immediately preceding that event as the court may consider reasonable in the circumstances; (b)that the bankrupt has continued to trade after knowing or having reason to believe himself to be insolvent;(c) that the bankrupt has contracted any debt provable in the bankruptcy without having at the time of contracting it any reasonable ground of expectation (proof whereof shall lie on him) of being able to pay it; (d) that the bankrupt has brought on or contributed to his bankruptcy by rash speculations or extravagance in living, or by recklessness, or want of reasonable care and attention to his business and affairs; (e) that the bankrupt has delayed or put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action or other legal proceedings properly brought or instituted against him; (f) that the bankrupt has within three months preceding the date of the bankruptcy order, when unable to pay his debts as they became due, given an undue preference to any of his creditors; (g) that the bankrupt has, in Singapore or elsewhere on any previous occasion, been adjudged bankrupt or made a composition or arrangement with his creditors; (h) that the bankrupt has been guilty of any fraud or fraudulent breach of trust; (i) that the bankrupt has, within three months immediately preceding the date of the bankruptcy order, sent goods out of Singapore under circumstances which afford reasonable grounds for believing that the transaction was not a bona fide commercial transaction; (j) that the bankrupt's assets are not of a value equal to 20% of the amount of his unsecured liabilities, unless he satisfies the court that the fact that the assets are not of a value equal to 20% of his unsecured liabilities has arisen from circumstances for or in respect of which he cannot firstly be held blamable; (k) that the bankrupt has entered into a transaction with any person at any undervalue within the meaning of s 98; (l) that the bankrupt has given an unfair preference to any person within the meaning of s 99; and (m) that the bankrupt has made a general assignment to another person of his book debts within the meaning of s 104. It can be seen from these provisions that cases of court discharge are divided into two broad categories. Subsection (3) deals with cases without what I would call special facts, and sub-s (4) deals with cases with special facts. The orders that the court may make are significantly different. In both cases, the court may refuse the application, but in the ordinary cases (those without special facts), the court has the option of ordering an absolute discharge, whereas in the special cases, this option is not available. Secondly, in the ordinary cases, if the court decides to make an order of discharge, it may impose such conditions (relating to post-discharge income and property) as it sees fit; but there is no mandatory requirement of imposing any condition. Note the word 'may' in sub-s (3). In the special cases, however, if the court decides to make an order of discharge, it must consider the option of requiring the applicant to pay a dividend of not less than 25% among other conditions, such as conditions relating to post-discharge income and property. Note the word 'shall' in sub-s (4). The general intention is that the special cases are to be considered more rigorously than the ordinary cases. The facts that make a case a special case falling under sub-s (4) areas follows:

(a) offences under the Act (b) offences under ss 421 to 424 of the Penal Code; and (c) the facts set out in sub-section 5. This reflects the concern for the need to guard against frauds, improper and irresponsible conduct. These three classes of facts together make a very long, if not exhaustive, list. The sub-s (5) facts I set out earlier are only some of them, but they

give a flavour of the sort of facts which the legislature thought relevant to a consideration of such applications. It can be assumed that all the conflicting interests, including the concerns I refer to, were taken into consideration in the formulation of all these provisions, as evidenced by this rather exhaustive listing. It can also be assumed that the factors that the court is required to take into consideration when dealing with an application for a discharge are all setout in the Act. It seems to me that the court, when exercising its discretion, which it undoubtedly has under these provisions, should be guided largely by these provisions. What the court must not do is to introduce or take into consideration requirements or factors which go against the dominant object and purpose of the Act, ie to give people who have been made bankrupt through genuine business failures a chance to start life anew, while treating the special cases with greater vigilance. Unlike in s 125 cases (discharge by Official Assignee), where the waiting period is five years, the legislature has refrained from stipulating any minimum waiting time before an application for discharge may be made under s 124. The section provides that an application may be made 'at anytime after the making of a bankruptcy order.' It seems to me that except in very exceptional circumstances, the minimum waiting time for s 124 cases should be at least similar to that for s 125 cases; it should probably be longer, but not necessarily in a proportion measured by the amount of the indebtedness, as otherwise there would be many cases where no application could ever be made because of the size of the debt, and this would be quite contrary to the intention of the Act.

[21] I think it is now an opportune moment for me to say that it is wrong for creditors to think that they have a substantive right given by law to make a person a bankrupt or continue to keep them a bankrupt until their natural death. In my view it has never been the intention of parliament to give absolute right to creditors to make a person a bankrupt. The discretion to make a person a bankrupt is entrusted to the courts and the courts can exercise the discretion not to make a person bankrupt according to the justice of the case. The relevant provision of the BA 1967 is s 4 which states as follows:

Subject to the conditions hereinafter specified, if a debtor has committed an act of bankruptcy, *the court may on a bankruptcy petition* being presented, either by a creditor or by the debtor make an order for the protection of the estate, which order is in this Act called a receiving order. (Emphasis is mine).

[22] Further, the court is vested with the jurisdiction to discharge the bankrupt. In ordinary circumstances the court will make a person bankrupt if the conditions stated in s 5 of the BA 1967 is satisfied. It must be asserted that for all general principles and rules there are always exceptions. It may be recognised exceptions pursuant to case laws or possible exceptions to be confirmed by case laws. This is an area where there appears to be a slow progress or no progress by jurist and judgments of courts within the bankruptcy regime to ensure deserving cases are not made a bankrupt to ensure civil liberties guaranteed under the federal constitution are preserved according to the justice of the case. Because the court has a discretion the court may refuse to make a person a bankrupt, in case where a person is spending his last days in death bed or such similar situations or for other good reasons which may include practical and feasible considerations which will benefit all parties which I need not elaborate now.

[23] For reasons stated above, I take the view that this is a fit and proper case that I should without any reservation allow the appeal with no order as to costs. I hereby order so.

Appeal allowed with no order as to costs.

Reported by Sally Kee